UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

MARQUEZ BROTHERS ENTERPRISES, INC.

and Case 21-CA-39581

ALFONSO MARES, an Individual

and Case 21-CA-39609

JAVIER AVILA, an Individual

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS OF MARQUEZ BROTHERS ENTERPRISES, INC.

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I. Introduction

On June 22, 2011, Administrative Law Judge (ALJ) William G. Kocol issued his decision in these cases, making findings of fact and conclusions of law that Marquez Brothers Enterprises, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by discharging Alfonso Mares and Javier Avila because they engaged in union activities. The ALJ also found that Respondent had coercively encouraged employees to ask the Union to return authorization cards that employees had signed, coercively interrogated an employee concerning his union activities, and threatened an employee with unspecified reprisals because he engaged in union activity.

On July 20, 2011, Respondent filed 40 exceptions to the ALJ's decision together with a supporting brief.[1] The majority of Respondent's exceptions constitute a wholesale attack on the ALJ's credibility resolutions, findings and conclusions that the two alleged discriminatees were terminated because of their union activities. Respondent seeks to substitute its own judgment for that of the ALJ. Yet a review of the record and relevant Board precedent make it abundantly clear that the ALJ's decision is well-founded, and is supported not only by the General Counsel's witnesses and documentation, but in many respects by Respondent's own witnesses and documentation. Respondent's exceptions are without merit and should be rejected.

II. Statement of Facts

A. Alfonso Mares has worked for Respondent since 2005.

Alfonso Mares ("Mares") began working for Respondent as a perishable sales driver on January 17, 2005. As a driver he delivered a variety of perishable goods such as

[1] On July 29, 2011, due to a technical error, the Executive Secretary extended the date to file exceptions in this case to August 26, 2011.

cheeses and yogurts to various grocery stores in Southern California. (Tr. 22).[2] Mares had the same route for the last 4 ½ years, which covered about 30 stores. Mares delivered to 6 to 8 stores a day. Depending on the size of the store, Mares would deliver there from one to three times a week. (Tr. 24). Mares worked Monday through Friday beginning around 4 a.m. and finishing anywhere from 3 p.m. to 6 p.m. (ALJD 4:3-8; Tr. 25).

When making deliveries to the stores, Mares would arrive and ask a manager at the store for the order. Then Mares would provide the requested items and check the shelves to make sure there was no expired product. If a product had expired, then Mares would remove it and create a receipt or credit memo for the expired product he had removed. (Tr. 23). Drivers would be on a tight schedule to make their deliveries on time and as a result at some stores he would be in a rush to complete the delivery to get to the next stop. (Tr. 211). Mares was supervised by admitted supervisor and agent Andres Veloz ("Veloz") for the last year and a half of his employment. (Tr. 8, 25, 281).

B. Alfonso Mares initiated organizing a union at Respondent's facility.

Around May 2010, Mares was unhappy with the situation at Respondent's facility and thought things could improve if he brought a union in to represent Respondent's drivers. Sometime in the beginning of May 2010, Mares spoke with a driver from Bimbo, a union represented bread company, about how to start organizing a union. The Bimbo driver gave Mares a business card of Teamsters Local 952 Business Representative/Organizer Ruben Lopez ("Lopez"). (Tr. 25-27; GC 3). Mares immediately called Lopez and spoke with him. Lopez then referred Mares to his

[2] Throughout this brief, references to the ALJ's decision will be referred to as "ALJD" followed by the appropriate page and line number. All references to the hearing transcript will be referred to as "Tr." followed by the page number. General Counsel's exhibits will be referred to as "GC" and Respondent's exhibits as "R" followed by the exhibit number.

colleague Organizer Gary Smith ("Smith"). (Tr. 16, 27). In May 2010, Smith and Mares spoke on the phone two to three times about organizing a union at Respondent's facility. During these conversations, Smith told Mares, among other things, to obtain names and phone numbers of other employees who supported the union.[3] (Tr. 16-17, 27-28).

After speaking with Smith, Mares began asking his co-workers when they arrived to the facility if they were interested in the union. If they were, Mares asked them to write their name and phone number on a sheet of paper. Mares approached approximately 17 drivers about the union, including Javier Avila ("Avila) who expressed support for a union and wrote his name and phone number on the list Mares was circulating. (ALJD 4:14-17; Tr. 28-29, 95-96; GC 2). After obtaining 16 names of employees who were interested in the union, Mares then gave this list to Organizer Gary Smith in June 2010. (Tr. 17, 65-66; GC 2).

C. Respondent learned of Alfonso Mares' union activity.

1. Jesse Agosto signed the union list.

One of the last people Mares spoke to about bringing in a union to Respondent's facility was driver Jesse Agosto ("Agosto"). Agosto lives with his mother, Bertha Yontomo ("Yontomo"), who works for Respondent as an accounts receivable collection clerk collecting money from stores. Mares spoke to Agosto around 3:45 a.m. by the entrance of the warehouse on June 1, 2010.[4] (ALJD 4:17-19). Mares asked Agosto if he would support the drivers bringing in a union. Agosto expressed agreement to bring in a

[3] Smith acknowledged that he told Mares to be careful so that his identity would not be known to management. (ALJD 4:11-14; Tr. 19). However the record is absent of what, if any, response Mares made to Smith's suggestion.

[4] Mares' time card from that day shows he clocked in that morning at 3:37am (GC 4).

union and wrote his name and phone number on the list. (Tr. 30-32, 235; GC 2, 4). Agosto did not testify.

2. Jesse Agosto's mother, Bertha Yontomo called Alfonso Mares the evening of June 1, 2010 and demanded the removal of her son's name from the union list.

Around 9:30 p.m. on the evening of June 1, 2010, Agosto's mother, Yontomo, called Mares on his company issued Nextel radio. Yontomo immediately began yelling at Mares and demanding that he remove her son, Jesse Agosto's name from the union list. Mares denied knowing anything about the union list, but Yontomo did not believe him and ordered Mares to remove her son's name from the union list. (ALJD 4:19-27; Tr. 32-33). Yontomo did not testify at the hearing.

D. Respondent learned of Alfonso Mares' union activity and quickly attempts to find reasons to terminate him.

1. Supervisor Andres Veloz wrote up a supervisor report of employee occurrence for Mares on June 1, 2010.

Respondent uses a form titled "supervisor report of employee occurrence" which is "used by front line managers and supervisors to record daily employee occurrences, as they happen..." (ALJD 5:1-3; Tr. 297; GC 33). This report is basically the first step in issuing discipline to an employee. (Tr. 317-318).

On June 1, 2010, Mares supervisor, Andres Veloz typed on the computer a supervisor report of employee occurrence for Mares. (Tr. 294, 297; GC 33). Veloz wrote the following:

> Some days ago, this client, La Sabrosa Market in Orange the woman Gloria and Fernando was saying that this salesperson was offering poor service. He was not cleaning the yogurt cooler, and he was always in a bad mood. They did not know why they had him as a sales person, and they would rather not ask him for anything else because they would see that he always had a bad look on his face. He suggested to me that I should change him. This salesperson has already been

> spoken to and told to change his attitude with clients. But he said that that's how he was, and he was not going to change.
>
> Also some time ago, at Superior #110, Benjamin in charge of the deli complained from poor service, that he would drop off what they wanted but he would not talk to him. And this salesperson said it was something personal. He was going to speak with the client himself, but I told him that that was not the solution, that I was going to speak with the client so that this would not become any worse. (ALJD 4:34-50; Tr. 300; GC 33)

Veloz refused to answer why he wrote this supervisor report of employee occurrence for Mares on June 1, 2010. His testimony was full of pauses, and he was reluctant to answer many key questions. As a result of this behavior, the ALJ questioned Veloz to make sure Veloz understood the question, which Veloz assured the ALJ he did. (ALJD 5:6-9). Yet Veloz still would not answer, which left no explanation of his actions that ultimately led to Mares' termination. (Tr. 294-297).

a. The complaints from La Sabrosa Market occurred many months prior to June 1, 2010.

The first item on the June 1, 2010 supervisor report of employee occurrence concerns past complaints by the owners of La Sabrosa Market. (GC 33). La Sabrosa Market is located in Orange and was serviced by Mares. (Tr. 41, 257). Gloria Tinajero ("Tinajero") owns La Sabrosa Market along with her husband. (Tr. 257). After several long pauses, Veloz testified that Tinajero was the only one who complained from La Sabrosa Market, but he could not recall specific dates when she complained to him about Mares. Veloz testified that Tinajero's complaints could have taken place over a period of months, weeks or even a year prior to June 1, 2010. (ALJD 5:10-11). Veloz could not recall the last time Tinajero complained to him about Mares. Prior to his June 1, 2010 report, Veloz never made any written record of what Tinajero told him about Mares or

issued any written discipline to Mares. (ALJD 5:12-13; Tr. 301-304). Veloz did not recall Tinajero complaining on June 1, 2010. (Tr. 305).

Tinajero testified that she made one formal complaint to Veloz about Mares leaving a cooler of yogurt unplugged at the store. Tinajero could not recall the date of that incident, other than it was summertime. The other times she spoke with Veloz about Mares, she characterized them as comments about Mares' bad attitude (Tr. 260-262, 267-271). Tinajero admitted that she made comments to Veloz about Mares for at least a year, but never asked Respondent to replace Mares as her delivery driver. (Tr. 269-270, 279). Tinajero could not recall the last time she spoke with Veloz about Mares. (Tr. 272) Tinajero also never told Veloz that she felt unsafe while talking with Mares. (Tr. 277). Mares admitted when he received these complaints from Tinajero, Mares was not disciplined. (ALJD 5:11-13).

b. The complaints from store Superior #110 occurred months prior to June 1, 2010.

Veloz testified that he could not recall a specific date when he received complaints about Mares from Superior #110, but it was not on June 1, 2010. Veloz did not make any written record of the complaints from Superior #110 when he received them. (Tr. 305-306). Again, Veloz could not explain why he wrote these complaints from Superior #110 on the supervisor report of employee occurrence for Mares on June 1, 2010. (Tr. 294-297; GC 33).

2. Supervisor Andres Veloz wrote up a supervisor report of employee occurrence for Mares on June 2, 2010.

On June 2, 2010, Veloz wrote up another supervisor report of employee occurrence for Mares. (Tr. 311; GC 34). Veloz typed the following:

> On the day on Wednesday, 6/2/10, passing by the--by this salesperson's stores to see how the service was, and I saw the deli sections, I found myself with expired product, Food 4 Less 393 in Santa Ana; Cotija R. Grande COD 50412, one piece from May 15 '10: Jocoque, COD 50055, one piece from April 14, '10 at Superior #110; two pieces of Panels Mexican, COD 51004 from June 2nd, '10 at Big Saver #7; six pieces of Panela Mexican, COD 51004 from May 28, '10; to Jocoque, COD 50055 from April 14, '10. Also on prior days to this, clients customer Superior 110 and Big Saver 7, I visited them on 6/1/10 and Food 4 Less 393. What I had seen on 6/2/10, all of this product should have been picked up without exceptions. (ALJD 5:21-33; Tr. 312: GC 34).

Veloz does not have a set schedule of stores he visits of the drivers he supervises, but he tries to visit each store of his drivers at least once a month. (Tr. 313, 315). After a long pause, Veloz testified that he could not remember if he visited Mares' stores on two consecutive days in June 2010. (ALJD 5:45-47; Tr. 316-317). Veloz could not explain why, if he did, he visited Mares' stores on June 1, 2010. Veloz could not recall the last time he visited Mares' stores prior to June 1, 2010. (Tr. 315). After another long pause, Veloz could not recall which stores of Mares he visited on June 1, 2010 or the number of stores. (Tr. 315-316).

Veloz claims he found expired product on the shelves of three stores serviced by Mares-Food 4 Less #393, Big Saver #7 and Superior Warehouse #110, yet Respondent never presented any credit memos or other documents showing that any expired product was removed from these stores around the time Veloz supposedly found these expired products. (ALJD 5:35-38; Tr. 285-287, 292). Veloz called Mares on June 2, 2010 about what he had found, but did not indicate that Mares would be disciplined or that it was an issue, only telling Mares to be more careful. (ALJD 5:15-19; Tr. 53, 61, 288).

3. Andres Veloz did not conduct any investigation before writing the supervisor report of employee occurrence on June 2, 2010.

Prior to writing up the supervisor report of employee occurrence on June 2, 2010,

Veloz did not conduct any independent investigation. (Tr. 318). If Veloz had, he would have learned that Mares had removed expired product from two of the three stores Veloz listed in his report. On June 1, 2010, Mares delivered to Superior #110 and looking at the truck drivers daily invoice control sheet, Mares looked for, but did not find or remove any expired product from that store, but he did from what appears to be three other stores. (ALJD 5: 38-43; Tr. 49, 51-52; GC 10-lines 3, 6 and 9). Mares last delivered to Food 4 Less on June 2, 2010, and the records show that he removed expired product that day as documented in the truck drivers daily invoice control and credit memo Mares issued. (Tr. 54-56, 59; GC 11, GC 12, GC 14). Mares last delivered to Big Saver #7 on May 27, 2010 where he found and removed expired product. This included product with the code 51004, which Veloz noted in his supervisor report of employee occurrence as one of the ones that had not been removed. (Tr. 61-64; GC 14, GC 15, GC 32). Veloz never denied knowing Mares supported the union. (Tr. 280-320).

E. Respondent hastily decided to terminate Alfonso Mares for unsubstantiated reasons.

1. Andres Veloz' supervisor report of employee occurrences initiated Alfonso Mares' termination.

a. June 1, 2010

It is not entirely clear the order of the chain of events set off by Veloz' supervisor report of employee occurrences for Mares, but what is clear is that Mares was terminated as a result of Veloz' reports. After Veloz wrote up the June 1, 2010 supervisor report of employee occurrence for Mares, he gave it to Zulema Pintado ("Pintado") who works in Human Resources. Veloz could not recall what day he gave this document to Pintado. (Tr. 307-308). Pintado did not testify.

Javier Granados testified that he received the June 1, 2010 supervisor report of employee occurrence for Mares on June 1, 2010 from Pintado. After receiving the report, Granados claims he called the owner of La Sabrosa Market, Tinajero. Granados did not make any written record of his conversation with Tinajero. (Tr. 435-436). However, Tinajero testified that no one from Respondent ever called her to discuss any complaints she had about Alfonso Mares. Tinajero stated that the only person she ever complained to about Mares was Veloz. (Tr. 271-272).

Granados also claims that after speaking with Tinajero he called Mares to tell him about the complaint. Granados did not make any notes of this conversation with Mares. (Tr. 436-438). Granados then recalled doing nothing further in regards to Mares. (Tr. 438).

Although Veloz wrote on his June 1, 2010 report about a customer complaint from Superior Warehouse #110, Granados did not bother to call anyone from that store to follow up on the complaint or ask anyone else to call and follow up on the complaint. Granados never explained why he supposedly only looked into the complaint from La Sabrosa Market and not Superior #110, which according to Granados is a key account. (Tr. 437).[5]

b. June 2, 2010

Sometime in the afternoon of June 2, 2010, Pintado forwarded Veloz' June 2, 2010 report on Mares to Granados. (Tr. 438). Granados then asked Pintado for a copy of Mares personnel file. After reviewing Mares personnel file, Granados concluded that Mares had a continuing problem with customer service. Granados did not point out

[5] Granados also claimed that he was aware of job issues with Mares for some time based on three or four conversations with Veloz, which Granados did not document. Granados was unable to provide specifics regarding what exactly Veloz previously told Granados about Mares' work performance. (Tr. 431-434).

specifically what he saw in Mares' file that lead to this conclusion. (Tr. 439).[6] Granados did not independently check what was written on Veloz' supervisor report of employee occurrence. (Tr. 440). At some point, Veloz recommended to Granados that Mares be terminated because Veloz did not want to have any problems with service or bad attitude. (Tr. 293, 310).

After reviewing Mares personnel file, Granados then went to speak with Vice President of Operations Francisco Lara ("Lara") somewhere around 4 or 5 pm that day. Their conversation concentrated on Mares' not changing since a meeting Lara and Granados had with Mares several months earlier. (Tr. 385-386, 440-442, 453). Apparently, at this meeting with Lara, Granados and Mares in the beginning months of 2010, they addressed with Mares reports from customers that Mares looked dirty and was poorly dressed. Lara went over how Mares did not look clean shaven, his hair was long, and he wore his cap backwards. At the end of that meeting, Mares supposedly said he would change and be better groomed. (Tr. 377-378, 451). Mares denied ever attending such a meeting with Lara and Granados. (Tr. 78-80).

The conversation between Granados and Lara on June 2, 2010 focused on Mares not changing the items discussed with him at the earlier meeting, and as a result Lara approved Granados' recommendation to terminate Mares. (Tr. 387, 441-442, 453). Respondent does not have a progressive disciplinary policy. (Tr. 233).

[6] A review of Mares past employee discipline records reveals that his last discipline prior to his termination was on October 23, 2009, which was a verbal for a complaint from a store. Besides the one in October 2009, Mares had received no other discipline specifically for customer complaints, and no discipline at all for failing to remove expired product from the shelves. Despite the absence of any documented past problems with leaving expired product on the shelf, Granados claimed Mares had been issued discipline in the past for spoils. (Tr. 440; GC 16).

2. Mares was terminated on June 2, 2010.

Pintado typed up Mares' two employee discipline records using Veloz' supervisory report of employee occurrences, which Granados signed. (Tr. 317-318, 378, 443; GC 5, GC 6, GC 33, GC 34). In the late afternoon of June 2, 2010, Mares returned to Respondent's facility after completing his deliveries around 3:30 pm to 4 p.m. Granados stopped Mares and asked him to turn in his keys and took Mares to the company lobby. (ALJD 6:1-2; Tr. 34-36). Mares then sat in the lobby for about 2-3 hours before Granados came and brought him into the human resources office. (ALJD 6:3-5; Tr. 36). Once in the office, Pintado told Mares he was terminated because he had been aggressive with someone at a store, and they had found expired product at three of his stores. Mares denied being aggressive and that he had left expired product on the shelves. Mares asked to see proof of the expired product, but Respondent never showed it to Mares. (Tr. 37-38). Mares was first given the discipline record dated June 1, 2010, which he signed and wrote in the comment section that he had no problems with La Sabrosa Market, and that he did not find any credits at that store. This June 1, 2010 discipline record states that the complaint from La Sabrosa Market occurred on June 1, 2010 and that the customer felt unsafe talking to Mares. (ALJD 6:14-49, GC 5). Then Mares was given the second employee discipline record dated June 2, 2010 stating he was terminated, which he refused to sign. There is no mention of any issues with Mares personal appearance in either the June 1, 2010 or June 2, 2010 discipline record. (ALJD 9:28-30; Tr. 37-40; GC 5, GC 6). Mares clocked out that day at 7pm. (GC 4).

3. Respondent's policy regarding removing expired product is not concrete.

Numerous people testified about Respondent's policy regarding when perishable sales drivers must remove product from the shelves, and each one varied a little. This policy is not in writing. (ALJD 2:31-32; Tr. 211, 340-341). Mares testified that the product had to be removed either two days before the expiration or the day it expired, although some stores requested the product be removed up to five days before the expiration date. (ALJD 2:32-34; Tr. 24). Avila testified that his understanding was that the product needs to be removed one day before it expires. (ALJD 2:34-37; Tr. 93, 165-166). Gastelum testified that when the product was removed varied on a store by store basis. (ALJD 2:39-41; Tr. 210-211). Supervisor Paulo Cesar Barajas Gomez ("Barajas") and Granados both testified that the policy is to remove the expired product at least 5 to 7 days before it expires. (Tr. 322, 370). According to controller Arturo Perfecto ("Perfecto"), if a product will expire before the driver is scheduled to deliver there again, then the product needs to be removed from the customer's shelf. (ALJD 2:41-44; Tr. 227).

4. All drivers fail to remove expired product.

The drivers have a lot of responsibility at each store and a limited amount of time to do everything. As a result, when at a store, drivers always check the various products to see if any of them have expired or are near expiration, but may, from time to time, inadvertently leave product on the shelf that should have been removed. (ALJD 3:15-16; Tr. 93-94, 211, 341). Since this can happen, Respondent has a set up a system where the supervisors visit the drivers' stores and check for any expired product on the shelf. If the supervisor discovers any product that is on the shelf that should have been removed, he

removes the product and places it in the back and marks it with an "X". Then when the perishable sales driver visits that store the next time, he picks up the expired product. (Tr. 230-231, 381). Supervisors do not write up the drivers every time an employee fails to remove expired product. (ALJD 3:16-20; Tr. 342).

5. Respondent provided only three examples other employees who were terminated for similar reasons as Mares.

Respondent provided only three examples of employees who had been terminated for similar reasons to Mares, two in 2008 and one in 2009. (R 6, R 7, R 8). The first termination occurred while the employee was on a 30 day probationary period for performance issues and failed to remove expired product from the store shelves. (R 6). The second termination also took place while the employee was on a 30 day probationary period for performance issues. (Tr. 404; R 7). The third terminated employee's record indicates that Veloz reviewed the employee's stores on three separate days over a two week period finding expired product on each occasion. As a result of the employee's failure to remove expired product, Respondent lost shelf space at three stores. (ALJD 9:11-26; Tr. 406-407; R 8).

F. Javier Avila reignited the union campaign in September 2010.

Avila began working for Respondent in May 2008 as a perishable sales driver. He had the same route for the past 1 ½ to 2 years and was supervised by Cesar Barajas during his employment with Respondent. (Tr. 92, 25, 161). In about August or September 2010, Respondent cut employees' pay rate, which prompted Avila to begin speaking to his co-workers about trying to organize a union. (ALJD 12:1-2; Tr. 96-98). Avila obtained the number for Teamsters Local 63 ("Local 63")[7] from an employee at a

[7] This is a different Teamsters Local than the one Mares contacted. (Tr. 15-16).

unionized competitor company. Avila and a co-worker both called Local 63. Avila's co-worker got in touch with Local 63, and they began trying to schedule a meeting with employees and Local 63. (Tr. 98-99, 181-182). For about the next two weeks, Avila spoke to at least 25 employees about Local 63, their interests in the union and attending a union meeting. (Tr. 99-100). The first meeting with Local 63 field representative Carlos Barnett took place on September 24, 2010. Avila as well as other employees of Respondent attended this meeting, where Avila signed an authorization card. (Tr. 100-101, 102; GC 17).

Avila became one of the captains for Local 63, helping set up meetings and speaking to employees about Local 63 up until the election. (Tr. 102, 109, 182).

G. Teamsters Local 63 filed a petition and an election was held on November 19, 2010.

Teamsters Local 63 filed its initial petition to represent the perishable sales drivers on October 6, 2010. (GC 18, GC 19). The election was conducted on November 19, 2010, with Respondent receiving 20 votes and Local 63 17. (GC 22). These results were certified on November 29, 2010. (GC 23).

H. After the filing of the petition, Respondent solicited employees to seek revocation of their authorization cards from Local 63.

Less than a week after Local 63 filed its petition, Respondent prepared two letters for employees to sign requesting that Local 63 return their authorization card. Controller Arturo Perfecto provided these letters to Barajas. (ALJD 14:46-47; Tr. 336, 351, 364-365; GC 24, GC 31).

The cover letter is titled **HOW TO GET YOUR AUTHORIZATION CARD BACK FROM TEAMSTERS LOCAL 63**. The text of the letter is as follows:

Many employees have asked us how they can get their signed union authorization cards back. These employees are concerned that they were tricked by Teamsters Local 63 into signing authorization cards which are legally binding documents. If you have been tricked into signing a card, you can get your card back by writing a letter to the Union and asking for your card back. All your letter to the Union has to say is:

KENNETH HAARALA
PRESIDENT
TEAMSTERS
LOCAL 63
845 OAK PARK ROAD
COVINA, CA 91724-3624

DEAR SIR:

I HEREBY REVOKE THE AUTHORIZATION CARD. PLEASE RETURN MY ORIGINAL AUTHORIZATION CARD. THANK YOU.

SINCERELY,
(SIGNATURE)

Mail the letter to the Union and keep a copy for yourself. It is up to you whether you want to get your card back or not.

If You Have Not Been Told about UNION DUES, FEES, FINES, ASSESSMENTS, AND UNION RULES...Feel Free to Ask Your Supervisor for Information.

The second page had the date October 12, 2010 typed on the top and then the identical wording from the first page in upper case letters beginning with "KENNETH HAARALA" and ending with "SINCERELY." (GC 24, GC 31)

On October 12, 2010, Supervisors Barajas and Agustin Vasquez ("Vasquez") set up their lap tops at a table in the warehouse close to the break/lunch room. On the table were piles of papers and envelopes, which Barajas and Vasquez handed out to employees to sign. (Tr. 203-204, 350-351, 364-365). No employees asked Respondent how to obtain their authorization cards back. (Tr. 242, 360).

On October 12, 2010, Avila returned to the warehouse after finishing his route. As he walked inside, Barajas told Avila he needed to speak with him when Avila was

done. Barajas did not deny this. Avila completed what he had to do then returned to Barajas who was at the table with Vasquez and employee Julio Ponce. Barajas gave Avila two pieces of paper and an envelope and told him to read it and sign it, so they can get his union card back for him. Avila dated the first page, signed the second, and following Barajas' instructions wrote Local 63's address on the envelope along with Avila's return address. Avila put the two papers he signed into the envelope and handed it back to Barajas. Barajas told Avila, "Oh, don't worry. We're going to take care of that." Avila did not put a stamp on the envelope or mail it. Avila never asked Barajas or anyone else from management how to get his union card back. Barajas did not deny saying these things to Avila or that he provided Avila with these two papers and envelope. (Tr. 114-119, 336-337; GC 24).

Driver Abel Gastelum who was employed with Respondent in October 2010 had a similar experience regarding Respondent soliciting him to sign a letter requesting that Local 63 return his authorization card. Gastelum never asked any supervisor or manager of Respondent how to get his authorization card back. (Tr. 193-194). On October 12, 2010, Gastelum returned to the warehouse around 3:30 p.m. or 4 p.m. after finishing his route. Gastelum saw Barajas and Vasquez. Vasquez told Gastelum to go to the office to get a box cutter. As Gastelum was walking to get his box cutter, co-worker Julio Ponce came up to him and told him the union was a bad idea and asked Gastelum if he would sign a paper to get his card back from Local 63. Vasquez told Gastelum the papers were in the lunchroom. After getting his box cutter, Gastelum walked back to clock out and Ponce gave Gastelum the papers to revoke his authorization card to sign to get his card back as well as an envelope. At this point Gastelum and Ponce were about

six feet away from where Barajas and Vasquez were, and they had a clear view of Gastelum. Ponce told Gastelum to sign the papers, the same ones that Avila had signed. At that moment Vasquez told Gastelum, "Come over here. So you can sign here and no one will see you." Then Ponce and Gastelum walked over to the table. Gastelum stood by the table and placed the papers on them, signed them and addressed the envelope in front of Barajas and Vasquez. Then Gastelum gave Ponce the signed papers and envelope in front of Barajas and Vasquez. Ponce folded the papers and put them in an envelope. Ponce then placed the envelope on the table with the other addressed envelopes. Gastelum did not put a stamp on the envelope or mail it. (Tr. 195-205; GC 31). Vasquez did not deny telling Gastelum to come over and sign the papers. Neither Vasquez nor Barajas denied seeing Gastelum sign the papers in front of them. (Tr. 336-337, 350, 359-366).

Local 63 Field Representative Carlos Barnett testified that he received approximately 15 of these signed letters from Respondent's employees seeking revocation of their authorization cards, including Avila's and Gastelum's. The Local 63 stamp on the letters confirms that they were received by Local 63 on October 14, 2010. (Tr. 186-187; GC 24, GC 31).

I. After the filing of the petition, Respondent interrogated and threatened Javier Avila about his union activity.

1. Mandatory meetings with Vice President Francisco Lara.

Shortly after the petition was filed, Lara began holding mandatory meetings with employees to give them information about unions in order to assist them in making the correct decision in the election. (Tr. 458, 461). These meetings were held in the afternoon after the drivers returned from their routes. (Tr. 468). Although Lara claimed

these meetings were only informational, he made sure every driver attended one meeting a week, for a period of 6 to 8 weeks. (Tr. 458, 461, 465). Lara also passed out written information to the employees, which he received from his attorneys, but none were put into evidence. (Tr. 462). Anywhere from three to 10 drivers attended these meetings with Lara. (Tr. 459, 468). According to Avila, at these meetings Lara would tell the drivers that the union is not good for them, and the union would take their money. (Tr. 110).

Lara claimed that in almost every meeting Avila attended, he spoke up and made statements that he supported the company and not Local 63. (Tr. 459, 464-465). Lara testified that controller Perfecto was present at one of the meetings where Avila made such a statement. (Tr. 465). Perfecto, who had testified prior to Lara made no mention of Avila making such a statement. However, when recalled to testify after being present in the hearing room during Lara's testimony, Perfecto admitted he could not recall Avila's exact words, but claimed that Avila said things which made it seem like Avila was leaning towards the company. (Tr. 472-475).

Avila testified that he never made such "pro-company" statements at these meetings with Lara. Rather, Avila stayed quiet because he wanted to go home after a long day of work. Avila admitted that other employees made "pro-company" statements in order to appease Lara who would ask them things such as if they agree the union is bad, but Avila was not one of them. (Tr. 157, 469-470). Avila also testified that Perfecto was not present at any of the meetings Avila attended with Lara. (Tr. 469).

2. Cesar Barajas interrogated and threatened Javier Avila about his union activity.

Avila recalled Barajas talking to him quite a few times about the union. However one conversation really stood out for Avila, which took place at store Superior #102 in

October 2010. As Avila was stocking the yogurt, Barajas appeared next to him. Barajas asked Avila if he was "part of the union?" Avila answered no. Barajas went on to say, "Oh, because you are burnt with the lady. And you're also on the black list." Avila replied he had no time for the union. Barajas then left. (Tr. 112-114). Avila testified that "the lady" refers to Francisco Lara's wife-Elizabeth Lara who works for Respondent in a high capacity. (Tr. 114, 160, 323, 339-340). The term, in Spanish, which the interpreter literally translated to "burnt with a lady" explained that it is a phrase that means they're on to you, your identity has been revealed. (Tr. 158-160). Barajas denied making such statements to Avila. (Tr. 335, 337-338). Avila testified that after Barajas asked him if he was part of the union, he denied it because he feared for his job. (Tr. 114).

J. Javier Avila's job performance.

Avila was formally disciplined six times prior to his termination. The first one was on December 19, 2008 when he received a verbal warning for a customer complaint that it was out of a specific product. The second one was on May 19, 2009 for various reasons including failure to fill the yogurt area shelf and slow delivery. As a result, Avila was placed on probation for 30 days. The third one, a final written earning dated May 28, 2009 was for leaving 9 cases of spoiled yogurt in the back of a store. The fourth one is dated December 1, 2009, for which Avila was issued a two day suspension and second final written warning for product being out of stock, empty shelves and failure to service stores due to late arrival. The fifth one is dated February 20, 2010 and is a verbal warning for incorrectly invoicing two stores. The last one is dated October 5, 2010 and is a third final written warning and another suspension for two days for an empty shelf at a store, sleeping in the truck and lying to his supervisor about it, and poor service.

All Avila's discipline records except the first one indicate that "Future related incidents can result in further disciplinary action up to and including termination." (GC 26).

K. Events leading up to Javier Avila's termination.

1. Delivery to Northgate #19 on Friday, November 26, 2010.

Avila did not work November 22 or 23, 2010. (Tr. 133, 173, 179). He returned to work on Wednesday, November 24, 2010. (Tr. 133, 137, 179; GC 7). Respondent was closed on Thanksgiving and open that Friday and Saturday. (Tr. 130, 345). On Mondays the driver of the route picks up the flyer with the advertised specials of the products for that week. Since Avila did not work on Monday or Tuesday of the week of November 22, 2010, he did not pick up the flyer with the advertised specials. (ALJD 17:32-38; Tr. 173, 179, 351-352).

Avila worked on Wednesday and then was off the next day for Thanksgiving. He resumed his route on Friday, November 26, 2010 servicing stores that would have normally been serviced that Thursday. Avila regularly delivered to store Northgate #19 twice a week on Tuesdays and Thursdays. (Tr. 129). Due to the Thanksgiving holiday, his last delivery there before he was terminated was on Friday, November 26, 2010. (Tr. 129-130; GC 7). On November 26, 2010, Avila arrived at Northgate #19 sometime between 9 a.m. and 11 a.m. After his arrival at Northgate #19, Avila went to the deli section. The deli shelf at Northgate #19 has a dedicated area for both of Respondent's brands-El Mexicano and Rancho Grande. Respondent's Rancho Grande products consists of cheeses and creams, which includes sour cream. (Tr. 173, 244-245). Avila noticed that the portion of the cooler for the Rancho Grande product was completely full with product filling the front of the shelf to the back. (Tr. 132-133, 171-174). A full shelf at Northgate

#19 contains approximately 125-200 individual pieces of Rancho Grande products. (Tr. 132, 174-175). The Rancho Grande cheese was on sale beginning that Friday for $1.99 from the regular price of $3.49. (Tr. 175, 332-333).

Avila then checked to see if there was any expired product and removed the expired product he found. (Tr. 131, GC 27). After that Avila went to look for the store manager and the deli manager to see what and how much product they wanted him to leave. However neither manager was there. (Tr. 131).

As a result of not having a specific request from the store regarding how much product to leave, it is up to the driver to decide how much and what product to leave. This is basically a guessing game, with the driver taking into account several factors such as time of the month, prior sales at the store and sale products. (Tr. 132-133, 161-162, 172-173, 175-176, 208-209, 249). At this point Avila took into account that 1) the shelves of the Rancho Grande product were still full after Thanksgiving; 2) it was the end of the month when people typically do not spend a lot of money as bills and rents are due; and 3) he would be back on Tuesday to deliver fresh product. Taking these factors into account, Avila reached the conclusion not to leave any Rancho Grande product. (ALJD 17:39-44; Tr. 131, 133, 172-173, 175-176). However, Avila noticed that cooler needed El Mexicano product and sold some that day. (GC 28). Avila's pay is based in part on a .5 commission based on sales to stores, so the more product he sells, the more money he makes. (Tr. 179-180).

If a driver decides to leave product on his own, he runs the risk of having the store call Respondent to come pick it up. Then the driver would have to make an extra stop to pick up the product he left earlier. (Tr. 131-132, 208-209, 345-346).

2. Monday, November 29, 2010.

Avila worked on Monday, November 29, 2010. Sometime between 5 a.m. and 7 a.m. Barajas called Avila on his Nextel radio to check in and make sure everything was going well. (Tr. 120). Later that day sometime between 11 a.m. and 12 p.m., both Avila and Barajas were at store Superior #102 when Barajas received a phone call from the deli manager at Northgate #19. The deli manager from Northgate #19 informed Barajas that the store needed the Rancho Grande product that was on special. (Tr. 331, 344).

Barajas then called Avila on his Nextel radio to find out where Avila was. Barajas walked around a corner and found Avila and asked him if he had left product for the special at Northgate #19. Avila answered no, because the shelf was already full and there were two cases in the back room. Barajas told Avila that the store had run out of that product and he needed Avila to take them more. Avila said that was fine and made a delivery there later that day. When Avila got there, he saw that the shelf was empty. Avila also saw two cases of cheese in the back room. (Tr. 121-124, 133-134, 331-332; GC 29, GC 30). After looking at the boxes more closely, Avila saw that they were boxes of El Mexicano cheese, which looks the same as the box for Rancho Grande cheese. (Tr. 134). Avila denied that he told Barajas specifically there were two boxes of Rancho Grande cheese in the back. (Tr. 133-134, 331-332).

3. Empty shelves at stores.

Between regularly scheduled deliveries, Respondent will not know if the store is running out of product unless a customer calls to notify them. However, a store can contact the supervisor seven days a week to request additional product be delivered on one of their non-delivery days. After Avila's delivery on Friday, no one from Northgate

#19 contacted Barajas until around 11 a.m. or 12 p.m. on Monday, November 29, 2010 about needing additional product. (Tr. 125-126, 248, 344-345).

It is unavoidable for a driver to have empty shelves at a store. This is based on any number of factors including unforeseen purchase of a product and a guessing game on the part of a driver regarding how much product to leave. Respondent provided no examples of any other employees who were terminated solely for having empty shelves. (Tr. 125, 209-210, 248-251).

L. Respondent decided to terminate Avila immediately after the election when in the past it tolerated Avila's work performance.

Javier Granados testified that he had been aware of performance issues with Avila since December 2008 from conversations with Avila's supervisor Cesar Barajas. (Tr. 409-410). Barajas admitted that he had had a lot of problems with Avila's work for a long time. (Tr. 338-339).

On about November 29 or 30, 2010, Barajas and Granados had a conversation regarding Avila's work performance. (Tr. 338-339). Barajas told Granados that Avila had not left enough product at a store that was on special, which Avila admitted. (Tr. 424). Apparently Respondent took pictures of the empty shelf at Northgate #19, but never submitted those into evidence. (Tr. 425). Barajas testified, without explanation, that he recommended to Granados that Avila be terminated. (Tr. 334). Granados came to the conclusion that Avila, like Mares, did not want to change, and as a result decided to terminate Avila. (Tr. 426).

Once Granados made the decision to terminate Avila, he went to obtain Vice President Francisco Lara's approval. (Tr. 426-427, 445). During this conversation they discussed Avila's, "general attitude that he had toward the company was very negative."

(Tr. 456). Lara gave Granados the go ahead to terminate Avila. (Tr. 427, 457). Both Granados and Lara denied knowing Avila was engaged in union activities. (Tr. 390, 459). Respondent does not have a progressive disciplinary policy, and tries to take corrective actions. (Tr. 233, 381-382; R 2). Respondent never explained what distinguished the incident in November 2010 from Avila's past infractions to warrant termination over another suspension or another final warning. Zulema Pintado in human resources, who did not testify, then typed up the employee discipline record terminating Avila, which Granados reviewed and signed. (Tr. 446; GC 25). Avila was terminated on December 2, 2010 after meeting with Granados and Pintado. (Tr. 128-129, 427-428).

III. Argument

A. The ALJ's credibility determinations are supported by the record and there is no basis for reversing the findings.

Several of Respondent's exceptions are related to the ALJ's failure to credit certain testimony. (see exceptions 1, 4, 9, 11, 21, 22 and 23). However, it is established Board policy not to overrule an administrative law judge's credibility resolutions unless a clear preponderance of all relevant evidence convinces the Board they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Likewise, as set forth by the Supreme Court, the process of discrediting all witnesses of one side does not impugn the integrity of the trier of fact. *NLRB v. Pittsburgh Steamship Company,* 337 U.S. 656, 659 (1949). Here Respondent has provided no basis to set aside the ALJ's credibility resolutions.

The ALJ's decision notes that his findings were made based on the entire record, including his observation of the witnesses' demeanor. As for Respondent's claim that the ALJ failed to credit the testimony of Gary Smith instructing Mares and Avila to keep

their Union status hidden, the record shows that Gary Smith never gave such instruction to Avila. (Tr. 15-16, 18-19). The evidence is clear that Gary Smith's contact was only with Mares; therefore the ALJ could not have made any determination that Smith provided such instruction to Avila.[8] Further even though the ALJ credits Smith's testimony that he told Mares to keep his Union status hidden, that does not discount Mares' unrefuted union activity of speaking to co-workers about the Union, and that one of those employees, Jesse Agosto informed his mother, accounts receivable collection clerk Bertha Yontomo about Mares' soliciting signatures for the Union; or that Yontomo called Mares the night of June 1, 2010, and demanded he remove her son's name from the union list. None of these findings the Employer takes exception.

Regarding supervisor Andres Veloz' testimony, the record evidence supports the ALJ's finding that Veloz was reluctant to explain what prompted him to write up Mares' June 1, 2010 occurrence report. The record demonstrates that Veloz flat out refused to answer the question, despite the ALJ's repeated efforts to determine if Veloz understood the question (he did) and why Veloz was having a hard time answering it. The ALJ's observation that Veloz' testimony was riddled with long pauses, gulps of water and a few sighs supports the ALJ's conclusion of Veloz' testimony. (ALJD 5:4-8).

The ALJ clearly stated that he based his decision not to credit certain testimony of Respondent's customer Gloria Tinajero on his observations of her demeanor during her testimony, including her exaggerated responses. (ALJD 8:16-20). Respondent has presented no reason why this was incorrect.[9]

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[8] Avila's contact was with Teamsters Local 63 in about September 2010, while Gary Smith worked for Teamsters Local 572 and ceased working for them in June 2010. (Tr. 15, 97, 99).

[9] Record evidence supports the ALJ's finding that Tinajero complained only to Veloz, because even though Manager Javier Granados claimed he spoke with Tinajero about her complaints, he had no record of such a

The ALJ's finding that Vasquez and Lara never met with Mares to discuss his personal appearance is supported by the record.[10] In addition to Mares credibly denying such a meeting took place, Respondent failed to present any written record of the supposed meeting and as the ALJ pointed out, no reference to such a meeting was noted in Mares' termination papers. (ALJD 11:9-10). Thus, the ALJ's conclusion is proper.

The ALJ's determination that Avila did not speak up at meetings with Respondent and claim he was "with the company" is also supported by the record. As noted earlier, Teamsters Local 952 Organizer Gary Smith never instructed Avila to keep his union activity a secret, thus Respondent's argument that Avila made such pro company statements based on these instructions fails. Further, Respondent's evidence through the testimony of Arturo Perfect and Francisco Lara that Avila made these pro-company statements is suspect. Perfecto testified first and never mentioned that he attended any anti-union meetings with Lara or ever heard Avila make such a pro-company statement. However, after Lara's testimony that Perfecto was present at one such meeting, Respondent recalled Perfecto to the stand. Perfecto had been present for Lara's testimony, and as the ALJ noted, Perfecto's testimony was, "...more of an attempt to support his superior than relate the facts." (ALJD 12:36-38). Respondent provided no reason why Perfecto failed to testify earlier regarding hearing Avila make pro-company statements.

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conversation and Tinajero denied ever speaking with anyone else besides Veloz.(ALJD 8:17-18; Tr. 271-272).

[10] Respondent fails to cite the page and line number from the ALJD for this exception, number 11.

Without any basis, Respondent claims Avila's testimony was "self-serving." This unsupported assertion could be said for Lara's and Perfecto's testimony.[11] Respondent has provided no reason why Lara's and Perfecto's testimony about Avila speaking up at these meetings should have been credited over Avila's. The ALJ also made a logical conclusion based on the facts that it is highly implausible that at EVERY meeting Avila would make such pro-company statements, especially considering Avila's assertion that he made no such comments as he was tired at these meetings after having worked a full day, and just wanted to leave.(ALJD 12:30-38). Thus, the ALJ's conclusion that Avila never made such a statement is sound.

The conversation between Barajas and Avila was one on one. As such, the ALJ weighed the evidence and considered the demeanor of the witnesses. The comment, "burnt with the lady" was explained by the interpreter at the hearing as the ALJ noted as "someone is on to you, or that they know what is going on." (ALJD 13:20-22: Tr. 158-160). Respondent did not object to that interpretation at the hearing and has presented nothing in its brief in support of its exceptions to show that this explanation is incorrect. Respondent did not take exceptions to the ALJ's finding that it threatened an employee with unspecified reprisals because of union activity when Barajas told Avila that he was on the blacklist. (ALJD 13:30-33). As a result, the ALJ's conclusion that in that same conversation Barajas also told Avila he was "burnt with the lady" is reasonable.

Respondent's claim that the ALJ was biased towards the General Counsel is unfounded. Respondent notes two occasions when ALJ Kocol asked the General Counsel if he were going to object. (Tr. 277-278, 408). In the first instance (Tr. 277-278)

[11] Respondent failed to take exception to the ALJ's decision that Avila's denial of making pro-company statements in these meetings was, "...convincing and his demeanor was persuasive." (ALJD 12:38-39).

ALJ Kocol asked the General Counsel if there were any objections to the questioning by Respondent of customer Tinajero about whether she felt unsafe dealing with Mares. In response, the General Counsel raised an objection and ALJ Kocol overruled the objection and any subsequent objections to that line of questioning. (Tr. 277-278). Thus, the testimony on redirect examination by Respondent was allowed to continue and remained in the record. The second instance Respondent notes does not show any such "assistance" to the General Counsel by ALJ Kocol. ALJ Kocol asked General Counsel only, "any objection," to questioning by Respondent of its witness regarding the circumstances of other employees it terminated. The General Counsel answered, "none" and the testimony continued. (Tr. 408). Neither of these two instances is sufficient to show clear bias by ALJ Kocol. Here Respondent has failed, both on the record and in its exceptions and brief to present reliable evidence, much less preponderance of the evidence to demonstrate that the ALJ's credibility determinations were improper. Accordingly, ALJ Kocol's findings and conclusions should stand.

B. The ALJ properly found that Respondent violated Section 8(a)(1) and (3) of the Act by terminating Alfonso Mares because of his union activities.

1. Applicable Law

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer

knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus

2. Mares clearly engaged in union activity.

As the ALJ found, the unrebutted evidence overwhelmingly demonstrates that Mares began attempting to organize a union at Respondent's facility beginning in May 2010. (ALJ 10:10-11). Mares initiated the organizing on his own, first contacting the union, then soliciting approximately 17 employees to sign a paper with their names and numbers if they were interested in supporting the union. Mares' testimony about his union activities is corroborated by Union Organizer Gary Smith. Smith confirmed that he spoke with Mares about organizing a union at Respondent's facility in May and June 2010, gave him instructions to obtain names of employees who supported the union, and then received the employee list from Mares. Avila confirmed that he wrote his name and number on the list after Mares asked him if he supported the union.

3. Respondent had knowledge of Mares' Union activity.

As the ALJ correctly found, the facts of this case all point to Respondent having knowledge of Mares' union activities. (ALJ 10: 38-40). Although the ALJ did not find that Bertha Yontomo was a 2(13) agent, he found that all the facts, including Yontomo's actions, lead to the conclusion that Respondent indeed knew of Mares' union activities and terminated him as a result. The ALJ then recited the unrefuted facts, that early in the morning of June 1, 2010, Mares approached Yontomo's son, Jesse Agosto and solicited him to sign the union petition. That day, for never explained reasons, Mares was written up for incidents that took place a long time prior to June 1, 2010. That evening Yontomo

called Mares on his work issued Nextel radio and demanded he remove her son's name from the list. The next day Mares was terminated. (ALJD 4:19-27).

Here, Respondent chose not to present Yontomo as a witness, and as a result, Mares' testimony is unrebutted. Further none of the witnesses Respondent presented specifically denied that Yontomo informed them about Mares' union activities. Thus, the ALJ's conclusion was not, as Respondent claims, that he attributed Respondent's knowledge of Mares' union activity through Yontomo, but rather Yontomo's role was just one factor which led him to the conclusion that Respondent knew of Mares' union activities and terminated him as a result. (ALJD 10:36-11:16). Thus, ALJ Kocol's finding that Respondent was aware of Mares' union activities was based on the entire set of circumstances in this case, including Yontomo's call to Mares, the unexplained reasons for writing Mares up that same day for incidents that took place a long time prior to that day, and as the ALJ pointed out, the lack of evidence from Respondent other than Mares' union activities which demonstrate Mares' abrupt termination on June 1, 2010. (ALJD 11:4-7).

4. The ALJ found that Respondent exhibited animus against the union.

The ALJ concluded, and Respondent did not take exception, to the finding that although the direct evidence of animus occurred after Mares was discharged, Respondent's attitude towards the unions was the same in May/June 2010 as it was later on that year. (ALJD 11:12-16). As more detailed below, a few months after Mares was terminated, Local 63 filed a petition for an election at Respondent's facility, where Respondent demonstrated animus. As ALJ Kocol found, Respondent's anti-union response against Local 63 was swift, including unlawfully writing, distributing and

mailing letters to Local 63 for employees asking for the return of their authorization cards. (ALJD 15:41-44; 16:5-10). Also Respondent's Vice President, Lara, began holding daily meetings with employees about Local 63 for approximately 7 weeks prior to the election. Avila testified that at these meetings Lara would speak negatively about Local 63. Clearly, if Respondent had animus about Local 63 after the petition was filed, it is logical to conclude as the ALJ did, that Respondent harbored animus against unions all along, including when it found out Mares was attempting to organize a union. (ALJD 11:12-15).[12]

5. The ALJ correctly found that Respondent had knowledge of Mares' union activities and that was a motivating factor in his termination.

The elements of animus as well as knowledge may be established by circumstantial evidence. The Board has inferred unlawful motive where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). Here, as the ALJ found, the evidence surrounding the circumstances of Mares' discharge demonstrate that the reasons for his termination were as a result of his union activity. (ALJD 11:44-46, 21:21-24).

The way the facts played out show that Respondent's reaction to Mares organizing a union was immediate. Adverse action occurring shortly after an employee has engaged in protected activity raises an inference of unlawful motive. *State Plaza, Inc.*, 47 NLRB 755, 756 (2006); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). Here, Mares sought support from co-workers for the union over a few weeks in May 2010 and the first days of June 2010. Curiously, the same day that Mares obtained Agosto's signature on the union list the early morning of

[12] Respondent took no exception to this finding.

June 1, 2010, Mares' supervisor wrote a supervisor report of employee occurrence for Mares that contained stale customer complaints. That night Yontomo, Agosto's mom called Mares and demanded he remove her son's name from the list of union supporters. The next day after made to wait 2-3 hours, Mares was terminated. (ALJD 10:38-44; 11:1-2).

Although Mares' supervisor Andres Veloz' testified, he was reluctant to answer even the most simple question such as-why did you write up this report on June 1, 2010 as opposed to any other day? As the ALJ concluded, despite understanding the question, Veloz would not answer that question for fear of going against the interests of Respondent. (ALJD 5:5-9). None of the other of Respondent's witnesses ever answered that question either, leaving the validity of the report to be suspect, especially when Veloz did not deny knowing that Mares was involved in organizing a union.

Looking at what Veloz wrote on the June 1, 2010 report, he wrote about two complaints against Mares, one from La Sabrosa Market and one from Superior #110. For the first complaint from La Sabrosa Market, Veloz wrote it took place "some days ago." In Veloz' testimony, he could not recall when exactly he received this complaint referred to in the report. He also could not recall the last time he received any complaint about Mares from La Sabrosa Market. Whenever Veloz received the complaint from La Sabrosa Market, he did not deem it worthy enough at that time to write it down or make any changes as a result. However, for some unknown reason on June 1, 2010, these past complaints from La Sabrosa Market became important enough to document. The one person who should be able to explain why these complaints surfaced on a supervisor of employee occurrence report on June 1, 2010 is Veloz. However, after numerous pauses

and obvious internal conflict, Veloz would not answer why, and thus Respondent never provided a valid explanation of why Veloz wrote up the La Sabrosa complaint on June 1, 2010 and submitted it to his superiors. Veloz never testified and never put in writing that he received the complaint from La Sabrosa Market on June 1, 2010. Based on this, as the ALJ noted, the evidence is clear that the written warning given to Mares on June 2, 2010 falsely states that the complaint from La Sabrosa took place on June 1, 2010. (ALJD 6:44-47).

The owner of La Sabrosa Market, Tinajero testified she complained once to Veloz about Mares and a cooler incident, and the rest of the time made comments to Veloz about Mares. Tinajero could not recall when the incident with the cooler took place except that it was summer time, which as the ALJ found suggests the complaint was not in 2010, as Mares was terminated on June 2, 2010, before the start of summer. (ALJD 8:11-16). There is no dispute that Tinajero complained to Veloz about Mares, however the evidence shows that those complaints fell on deaf ears until Respondent learned about Mares' union activities.

Respondent did not call anyone from Superior #110 to testify about the supposed complaint regarding Mares. Like the complaint from La Sabrosa Market, this complaint from Superior #110 was made to Respondent some time prior to June 1, 2010. Veloz could not recall a specific date they were made, and did not make any record of them at the time. Veloz also could not explain why on June 1, 2010 he decided to write the complaint from Superior #110 in the supervisor report of employee occurrence, when it was made "some time ago" prior to June 1, 2010. There is also no evidence that anyone from Superior #110 complained again about Mares, after the supposed complaint referred

to in the report was made. No one from Superior #110 testified at the hearing to confirm these complaints were actually made.

Granados was not able to explain why he supposedly only followed up on the complaint from La Sabrosa Market noted in Veloz' report and not on the other complaint from Superior #110. Although Granados stated Superior #110 is a key account, there was nothing stopping him from calling Superior #110 or asking someone else to call and follow up on the complaint.

As the ALJ stated, Veloz could not recall if he visited Mares' stores on both June 1, 2010 and June 2, 2010. (ALJD 5:46-48). If Veloz visited Mares' stores on June 1, 2010, he did not write it on the supervisor report of employee occurrence for June 1, 2010. Although on Mares' June 1, 2010 employee discipline record, which was written on June 1, 2010, there is a reference to Veloz visiting only Superior Warehouse #110 and finding expired product at that store that day.[13] Respondent provided no explanation why on June 1, 2010 Mares was written up for something that was not referenced in Veloz' June 1, 2010, supervisor report of employee occurrence.[14] Respondent also provided no explanation why the "complaint" from Superior #110 was not written in either of Mares' employee discipline records.

Granados claims after receiving the two supervisor reports of employee occurrences for Mares, he looked at Mares' file and found Mares had continuing problems with customer service. However looking at Mares' past discipline records, he received only one specifically where a customer complained about service. Mares had no

[13] Under "date of this report" is typed 6/01/10.

[14] Respondent claims in its brief in support of its exceptions that the discrepancies can be attributed to additional facts learned by Respondent after the occurrence report, however no such evidence was ever presented by Respondent to support this assertion.

prior disciplines for leaving expired product at a store. Granados never pointed out or put into evidence exactly what he saw in Mares' file that led to his conclusion that Mares had continuing problems.

In addition to these supervisor reports of employee occurrences, Granados and Lara considered in their discussion on the appropriate discipline for Mares, an undocumented meeting they had with him several months prior to Mares' termination where they discussed Mares' personal appearance, such as his unclean uniform and wearing his hat backwards. Supposedly Lara and Granados agreed that Mares had not done anything to improve since that meeting, but no concrete examples were provided. On top of that, as the ALJ pointed out, there is no mention of this 2010 meeting Mares had with Lara and Granados in the termination papers Mares received nor anything about his appearance. As a result, the ALJ made the logical conclusion that this was added on to bolster Mares' termination (ALJD 9:28-31). Such shifting of rationales is evidence that the Respondent's proffered reasons for discharging Mares are pretextual. *Approved Electric Corp.*, 356 NLRB No. 45 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."). All of this evidence support the ALJ's decision that there was sufficient facts to find an inference that Respondent knew of Mares union activities, harbored animus towards his union activities and terminated him unlawfully. (ALJD 10:36:43-11:1-16).

6. Expired Products.

Respondent's claim that Mares left expired product at three of his stores is unsubstantiated. Veloz is the only one who supposedly found expired product on the shelves, but Respondent provided no record of its existence. Anytime expired product is removed from the shelf, a credit memo is produced documenting the code number and date it was removed, so the store can receive credit for that product. Respondent failed to produce any such credit memos or any other documentation showing that expired product was removed from any of the three stores Veloz noted in his June 2, 2010 report. (ALJD 3:19-21; 5:35-38).

Also looking at the June 2, 2010 supervisor report of employee occurrence, Veloz listed finding a product with a date of April 14, 2010 on it. It is highly unlikely that a product that expired a month and a half ago remained on the shelf without someone catching it, especially since Veloz testified that he tries to visit all the stores at least once a month. If he had done that, and if this product really were there, then Veloz also missed seeing it on prior occasions. (ALJD 5:46-51).

7. As the ALJ found, Mares' termination can be distinguished from the three other employees terminated for leaving expired product on the shelves.

As the ALJ noted, all three of the examples of other employees terminated for leaving expired products on the shelf can be distinguished from Mares. (ALJD 11:34-36). Two of them were on a 30 day probation period for performance issues when terminated. (ALJD 11:36-37). Mares was never placed on any type of probationary period. Respondent offered no reason why it could not have placed Mares on probation as it did for other employees, especially when Mares had no record of past issues for failing to

remove expired product. The last example Respondent provided of an employee terminated for having expired product on the shelf was as a result of the supervisor finding expired product in three different stores over a two week period, which led to reduction in shelf space at the stores. (ALJD 11:36-37). In Mares' case, Veloz allegedly found expired product on what appears to be one day, and there was no loss of shelf space or any other consequences as a result. Thus, the ALJ considered the other examples of employees Respondent claimed were terminated for similar reasons as Mares and correctly found that they were distinguishable. (ALJD 11:34-37).

8. The ALJ properly concluded that Respondent failed to meet its burden under *Wright Line*.

Respondent failed to establish that it would have discharged Mares absent his union activities. Although in its brief in support of its exceptions, Respondent claims Mares was terminated after repeated failure to perform his duties properly, the evidence, as the ALJ noted, does not support that. (ALJD 11:42-44). Part of the reason Mares was terminated had to do with complaints Respondent knew about for months, maybe even years. At the time the complaints were made Respondent took no disciplinary action against Mares. This demonstrates that when not engaged in union activity, the complaints were not important enough to even discipline Mares, yet months later, after engaging in union activity, they are used to justify terminating him.

Regarding the expired product, Mares had no history of leaving expired product on the shelves of the stores he serviced. Now after being employed for over 5 years, he may have left some expired product on the shelf, and he is terminated. Further, when Respondent actually terminated Mares on June 2, 2010, Mares was kept waiting 2 to 3 hours after he returned from work before being presented with any paper work.

Respondent never denied this fact nor presented any explanation for making Mares wait such a long time before terminating him. There was also no explanation why Mares had to be terminated on June 2, 2010. As the ALJ concluded, the hasty termination of Mares on June 2, 2010 can only be linked to the discovery of Mares' union activities the day before. (ALJD 11:1-7). Thus, Respondent has not satisfied its *Wright Line* defense.

B. The ALJ properly found that Respondent unlawfully encouraged employees to ask the Union to return their authorization cards in violation of Section 8(a)(1) of the Act.

The evidence is clear that less than a week after the Local 63 petition was filed, Respondent created, distributed, collected and mailed signed letters for employees to Local 63 asking for their authorization cards back. The Board has held that an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation. *The Jewish Home for the Elderly*, 343 NLRB 1069 (2004). However an employer may not "exceed the permissible bounds of providing ministerial or passive aid in withdrawing from union membership." *Chelsea Homes*, 298 NLRB 813, 834 (1990), enfd. mem 962 F.2nd 2 (2 Cir. 1992) (violation when the employer provided a sample form and preaddressed envelope).

Here as the ALJ found, Respondent went above and beyond what is allowed to assist employees with obtaining their authorization cards back. (ALJD 16:5-7). Despite the statement on the cover letter that many employees asked Respondent how to get their signed union cards back, there was no evidence that any employees asked such questions.

(ALJD 15:20-21). Rather, Respondent, on its own initiative, presented and distributed these letters to employees who never asked Respondent how to obtain their authorization cards back. The evidence shows that two admitted supervisors, Barajas and Vasquez sat at a table in the warehouse near the lunchroom on October 12, 2010. (ALJD 13:45-46). On the table they had two separate prepared letters which they received from Respondent's controller, informing employees how to obtain their authorization cards back. They also had envelopes and their lap tops on the table. Employee Julio Ponce was also there.

As employees were returning to the facility, they called them over to the table to provide them with the letters to sign to revoke their authorization card. In Avila's case, Barajas called Avila over to the table and unsolicited gave Avila the two letters and a blank envelope. Barajas asked Avila to read the letters and sign them in front of him. Avila signed the letter right then so as not to jeopardize his job. Barajas instructed Avila to address the envelope and put his address for the return. (ALJD 14:47-48). Avila followed Barajas' instructions-he put the two papers he signed into the addressed envelope and handed it back to Barajas. There was no stamp on the envelope at that time and Avila did not place the envelope in the mail. Barajas told Avila that they would take care of it. Barajas did not deny any of this exchange with Avila. Local 63 received Avila's letter seeking the return of his authorization card on October 14, 2010.

Abel Gastelum had a similar experience on October 12, 2010, with employee Julio Ponce providing him with the exact same letters as Avila received, to review and sign. As Gastelum was about to sign them, Vasquez instructed Gastelum to come to where he was to sign the papers. Vasquez did not deny saying this. Gastelum then

signed the papers and addressed the envelope at the table in front of Barajas and Vasquez, which neither denied. (ALJD 15:11-16). Gastelum put the envelope with the signed letters inside and gave it to Ponce who put it on the table in front of Barajas and Vasquez. Gastelum did not put a stamp on the envelope or mail it, yet it was received by Local 63 on October 14, 2010.

In its brief in support of exceptions, Respondent cites *Curwood, Inc.* 339 NLRB 1137, 1139-1140 in support of its position that these actions do not constitute a violation of Section 8(a)(1). However that case is markedly different than the allegations here. In *Curwood*, the allegation concerned grievance solicitation and interrogation. The facts involved a letter sent to employees by the employer about an upcoming election, with a blank piece of paper and envelope and asked employees to write down any questions they had. This is completely different than what is alleged here.

As the ALJ found, here Respondent not only prepared the paperwork to revoke the authorization cards and provided them to employees, but also arranged to have supervisors sit at a table in the warehouse and solicit employees to sign the letters in front of them, which negates any statement on the papers that it was up to employees whether or not to get their cards back. (ALJD 16:5-10). Thus, based on the record testimony the ALJ properly concluded that Respondent's actions of providing the letter and having supervisors pass them out and observe employees signing them violated Section 8(a)(1) of the Act.

C. The ALJ properly found that Cesar Barajas interrogated and threatened Javier Avila with unspecified reprisals.

Avila vividly recalled having a conversation with Barajas that took place at

Superior #102 in October 2010. While Avila was working, Barajas asked Avila if he was part of the union, which Avila denied. In response Barajas told Avila a saying in Spanish that means Respondent knows Avila is involved in the union and as a result he is on the black list. An employer violates Section 8(a)(1) of the Act if whether, "under all the circumstances" the remark reasonably tends to restrain, coerce, or interfere with the employee's rights guaranteed under the Act." *GM Electrics*, 323 NLRB 125, 127 (1997). Circumstances considered in evaluating the tendency to interfere include the (1) background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of the interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984).

First, Barajas is Avila's immediate supervisor. Second, the conversation took place while Avila was working at a store. Third, Barajas asked Avila if he was part of the union. Fourth, Barajas told Avila that his support of the union has been revealed and followed that up with a threat that Avila is on the "black list." Although Barajas did not explain to Avila what he meant by "black list," it is defined by Webster's II New College Dictionary (copyright 1995) as, "A list of organizations or persons that are disapproved, boycotted or suspected of disloyalty." That definition seems to fit the circumstances here, and as the ALJ noted, the Board has long held that it is unlawful to tell employees they are being blacklisted for supporting a union. (ALJD 13:31-32). Thus, the ALJ properly found that the conduct is coercive and constitutes interrogation and a threat of unspecified reprisals in violation of Section 8(a)(1) of the Act.

D. The ALJ properly concluded that Javier Avila was terminated because of his union activities.

1. Javier Avila engaged in union activities.

As the ALJ found, the evidence is overwhelming that Avila engaged in union activities. He was one of the employees who initiated contact with Local 63 and became one of the captains. From before the petition was filed until the date of the election, Avila spoke to employees about the benefits of Local 63 and encouraged them to attend union meetings. (ALJD 20:28-30).

2. Respondent knew about Avila's union activities.

Respondent knew that Avila was one of the employees behind the union organizing. This is demonstrated by Cesar Barajas questioning Avila about his involvement with the union. Barajas went so far as to tell Avila that his support of the union is now known by management, and as a result he is on the black list. Barajas also solicited Avila to sign a card asking for his authorization card back. (ALJD 20:30-32).

3. Respondent exhibited animus against the union.

As described above, after the filing of the petition at the beginning of October 2010, Respondent immediately began its anti-union campaign. Vice President Lara began holding daily meetings with employees to discuss the negatives of union representation and persuade them to vote for the company. These meetings went on for many weeks until the election. Respondent also demonstrated its anti union animus by immediately put together letters for employees to sign asking for their authorization cards back in violation of the law. (ALJD 20:34-37). The interrogation and threat by Cesar Barajas further demonstrate animus on the part of Respondent. (ALJD 20:34-39).

4. Avila's termination.

Avila's termination, shortly after the election also supports a finding of unlawful motive. (ALJD 20:39-40). Respondent claims that Avila was terminated for poor work performance while being on a final written warning. However, the ALJ took into account that Avila had performance issues throughout his employment with Respondent, and had Been on a "final warning" prior to 2010 on May 28, 2009 and December 1, 2009 and was not terminated for any subsequent infractions. (ALJD 21:13-15; GC 26).[15] The evidence also shows that Respondent was well aware of Avila's performance issues, tolerated them, and only terminated him after the union organizing.

Respondent has no progressive disciplinary policy, yet failed to explain why, immediately after the election, it decided to terminate Avila for behavior that prior to the union organizing was not a terminable offense. All Respondent could come up with was Avila did not want to change, and stated in its brief in support of its exceptions that it was a "business decision." However as the ALJ found, Respondent failed to show that it would have terminated Avila absent his union activities. (ALJD 20:47-51-21:1-18). As the ALJ noted, almost every discipline issued to Avila contained the admonishment that future related incidents will result in further disciplinary action "up to and including termination." (ALJD 20:18-20). So the mere fact that Avila's last warning prior to his termination had this language is insignificant. In fact, Avila's last warning prior to being terminated was given to him before the petition was filed and was actually a warning and suspension for what appears to be similar incidents to ones he committed in November

[15] Further evidence that being on a final warning has no merit can be shown in Mares' situation. In a warning dated July 3, 2007 given to Mares, the "final written" box is marked, yet he received several warnings after that and was not terminated. In Mares' last discipline on October 23, 2009, prior to his termination, the "final written" box was not checked, yet he was terminated nonetheless for "performance issues" over six months later. (GC 16).

2010, yet Avila was not terminated at the beginning of October. These incidents Avila was written up for in October 2010 included empty shelves and lying to a supervisor.

Looking at the reasons for Avila's termination, Respondent seems to have made them to be more severe than they really are. There is no dispute that Northgate #19 ran out of the Rancho Grande product that was on sale. However, Avila did not do this intentionally. When the customer does not tell the driver how much product to leave, it is up to the driver to use his best judgment. Here Avila took into consideration many factors, including the full shelf of Rancho Grande products indicating few sales of the product since the last delivery, it was Thanksgiving weekend, it was the end of the month, and that he would be back on Tuesday for another delivery. (ALJD 17:39-44). Since Avila's pay increased based on the amount of sales he made, he had incentive to leave more product. There was absolutely no incentive for Avila to leave no Rancho Grande product other than he thought it would not sell. For Respondent to find it a terminable offense for the sale product to run out is a stretch. Looking closely at the events, Avila left El Mexicano product at Northgate #19 based on his assessment of the shelves. Also based on his assessment, he decided not to leave any Rancho Grande product, including the one that was on sale. There was no way for Avila to know that not just the Rancho Grande sale product would sell out, but also all the other Rancho Grande products. Since it is difficult to predict future sales, Avila could only make an educated guess based on the factors at the time, which is what he did.

In addition, Respondent makes no claim that Northgate #19 complained about selling out of the product or threatened to remove shelf space for Respondent's products as a result of needing more product. Certainly Northgate #19 had enough Rancho Grande

product for Friday, Saturday, Sunday and part of Monday, as no one from the store called Respondent prior to that day to say they were out of product. Avila was scheduled to deliver Tuesday morning, so his decision to not leave additional product was not far off. (ALJD 21:1-10). Respondent also suffered no harm as a result of Avila not leaving Rancho Grande product. Respondent merely delivered additional product to the store that Monday. Respondent provided no examples of any other employees who were terminated merely for having an empty shelf.

The reference to Avila misrepresenting to his supervisor about leaving two boxes of Rancho Grande product in the back is simply not true. As the ALJ found, Avila credibly denied that he told Barajas he had left two boxes of Rancho Grande product in the back, and that Respondent manufactured this lie to strengthen its case to terminate Avila. (ALJD 17:50-53-18:1-2).

5. Respondent's *Wright Line* defense fails.

Respondent's defense that it terminated Avila because of poor work performance is unpersuasive. Countless times prior to Avila's termination his work performance was sub par, which Respondent decided warranted only warnings and suspensions. Avila was even given three final written warnings, two suspensions and advised numerous times the next incident could lead to termination, but it never did until the union organizing started. Respondent has failed to explain why this time, in November 2010, Avila's work performance warranted termination when in the past worse violations did not. There is nothing special or distinct about the incident at Northgate #19, as stores often run out of product and Respondent has to deliver more. As the ALJ found, and Respondent took no exception to, empty shelves happened among

drivers and Respondent presented no evidence that employees are routinely disciplined when there are empty shelves. (ALJD 20:50-51-21:1-2). As a result, Respondent failed to meet its burden under *Wright Line*. (ALJD 21:16-18).

IV. Conclusion

The record evidence and Board law provide abundant support for ALJ Kocol's credibility determinations, findings of fact, and conclusions that Respondent violated 8(a)(1) and (3) by discharging Alfonso Mares and Javier Avila because they engaged in union activities, and violated Section 8(a)(1) of the Act by coercively encouraging employees to ask the Union to return authorization cards that employees had signed, coercively interrogating an employee concerning his union activities, and threatening an employee with unspecified reprisals because he engaged in union activity. Accordingly, it is recommended that the ALJ's rulings, findings, and conclusions regarding the foregoing be affirmed, and that Respondent's exceptions be rejected.

Respectfully submitted,

Stephanie Cahn
Counsel for the Acting General Counsel
National Labor Relations Board

Dated at Los Angeles, California this 8th day of September, 2011

STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions in Cases 21-CA-39581 and 21-CA-39609 was submitted by E-filing to the National Labor Relations Board on September 8, 2011. The following party was served with a copy of the same document by electronic mail:

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The following party was served with a copy of for the Acting General Counsel's Answering Brief to Respondent's Exceptions in Cases 21-CA-39581 and 21-CA-39609 via overnight mail on September 8, 2011:

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Dated at Los Angeles, California, this 8th day of September, 2011.

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